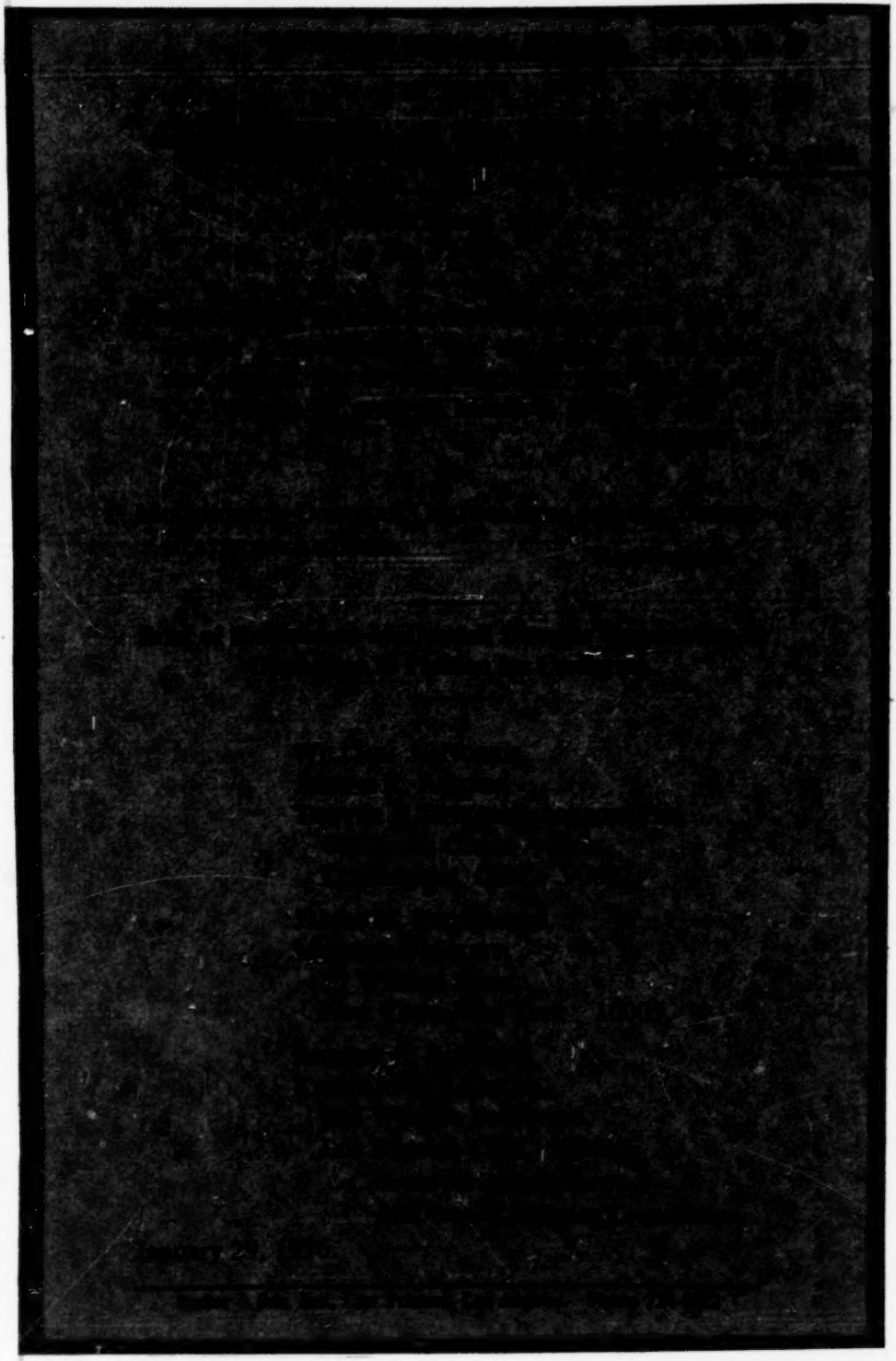

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BLEED THROUGH

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-934

GERALDINE L. FLANAGAN, individually and as heir of CLAIRE LUX, deceased, and on behalf of the heirs and next of kin of the passengers who died in the DC-10 Paris air crash of March 3, 1974, *et al.*,

Petitioner,

vs.

MCDONNELL DOUGLAS CORPORATION and the UNITED STATES OF AMERICA,

Respondents.

Brief of Respondent McDonnell Douglas Corporation in Opposition to Petition for Certiorari.

ARGUMENT.

The Petition presents two questions—(1) whether it was error for the court of appeals to vacate the class certification, and (2) whether the court of appeals abused its discretion in vacating the certification by writ of mandamus. Both are moot. Even if they were not moot, certiorari should be denied because there is no conflict in the circuits, the issue of class certification was correctly decided by the court of appeals, and the court of appeals did not abuse its discretion in issuing the writ of mandamus to correct an abuse of discretion by the district court.

I.

The Questions Presented Are Moot.

This litigation arises out of a crash of a Turkish Airlines DC-10 near Paris, France, on March 3, 1974, in which all 346 passengers and crew members were killed. On August 6, 1974, the United States District Court for the Central District of California filed its order certifying as a class "all heirs, beneficiaries, and personal representatives of the passengers aboard the aircraft." [Petition, A16 at ¶ (2).] The order also provided: "All cases heretofore or hereafter filed are hereby severed as to liability and damages and consolidated on the issue of liability." [*Id.*, A16.]

The order further provided that a plaintiffs' committee previously designated by the court, consisting of both counsel to the class and other plaintiffs' counsel "shall continue to function and shall be in overall charge of the liability phases of this consolidated litigation." [Petition, A17 at ¶ (4).] Finally the order also provided that members of the plaintiffs' committee "shall continue to maintain full and complete responsibility for the representation of their clients, . . ." [Petition, A17 at ¶ (4).] Thus, although a class was broadly certified to include all existing and potential plaintiffs, responsibility for representing individual plaintiffs remained with their independent counsel.

On July 16, 1974, when orally announcing its decision, the district court expressly permitted all plaintiffs' counsel to file additional actions on behalf of additional claimants:

> ". . . the lawyers who had the cases now would keep those cases and be responsible for them; that if they have retainers now, and they file cases later, they will be their cases.
>
> * * *

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> That leaves you, Mr. Sterns, Mr. Butler [plaintiffs' counsel], free to roam the 18 Arabian countries, England and Japan—." [Reporter's Transcript, July 16, 1974, p. 47, lines 12-20; *see generally,* Appendix I.]

Since August 6, 1974, when the court filed its class certification order, the number of potential class members unrepresented by their own counsel has steadily dwindled as additional actions have been filed in the Central District of California seeking damages for the wrongful death of the Paris crash decedents. In all such cases plaintiffs have been represented by counsel.* At this time claims based upon the death of two passengers have been settled outside the United States and actions have been filed in the Central District of California accounting for the death of all 12 crew members and 325 of the 334 passengers aboard the plane, reducing the number of decedents unaccounted for to 7 passengers, none of whom were residents or citizens of the United States. [Affidavit of Joseph R. Austin, Appendix II.]

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*In an order filed by the district court on January 26, 1976, the court summarized:

> "The cases are in roughly four blocks, i.e., those represented by the Speiser-Butler [Speiser & Krause of New York and Butler, Jefferson & Fry of Los Angeles] group of law firms (approximately 160), those represented by the Kreindler-Morgan [Kreindler & Kreindler of New York and Morgan, Wenzel & McNicholas of Los Angeles] group of law firms (approximately 66), those represented by Walkup, Downing & Sterns [of San Francisco] (approximately 82), and those otherwise independently represented or by the attorneys for the crew." Order Fixing Date for Completion of Discovery, Setting Pre-Trial Date and Setting Trial Date—Liability Only—filed January 26, 1976, *In re Paris Air Crash of March 3, 1974,* MDL-172, United States District Court for the Central District of California, p. 2, fn. 2.

Whatever the situation may have been on August 6, 1974, when the district court made its original finding on numerosity, the unrepresented potential claimants are no longer "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). Nor, since the district court has ordered the cases consolidated on liability and assigned non-class counsel as well as class counsel responsibility for liability issues, is class treatment "superior" to consolidation for resolution of liability issues. Fed.R.Civ.P. 23(b)(3).

In sum, the wrongful death actions filed before and after August 6, 1974, all of which are consolidated on the issues of liability, have mooted the class certification issue. All plaintiffs in those cases are represented by counsel, thereby reducing the potential size of the unrepresented class to any persons who might have claims based upon the deaths of seven passengers. Thus this mass disaster litigation is proceeding, on a consolidated basis, with nearly all potential claimants individually represented by counsel. To convert this litigation into a class action would serve no apparent purpose.

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II.

There Is No Court of Appeals Decision in Conflict With the Decision of the Ninth Circuit That Rule 23 Does Not Permit Certification of a Class Whose Members Have Independent Damage Claims for Wrongful Death Arising Out of a Single Airplane Accident.

The Petition discloses no basis for the granting of certiorari. No conflict among the courts of appeals is asserted.* The Petition discloses only that some district courts have certified class actions in cases of multiple damage claims for personal injury or wrongful death arising out of a single incident, while others have not. [See Petition, pp. 10-14.]

In short, there is no conflict in the circuits and no "special and important reasons" for granting certiorari. Supreme Court Rule 19. We respectfully submit it will be time enough for the Court to review the class certification question if and when some other court of appeals renders a decision that conflicts with the decision of the Ninth Circuit below.

---

*The unpublished summary denial of a petition for a discretionary writ of mandamus [see Petition, pp. 10-11] does not create a conflict in decisions of the Ninth Circuit. Even if such a conflict did exist, such "internal difficulties" do not warrant certiorari. *Wiseniewski v. United States*, 353 U.S. 901, 902 (1957).

III.

It Is Within the Sound Discretion of the Court of Appeals to Issue Mandamus to Correct the District Court's Abuse of Discretion.

In issuing a writ of mandamus to correct the district court's abuse of discretion, the court of appeals properly exercised its discretion, independent of the process of appeal, to supervise the administration of justice within the circuit. See *Schlagenhauf v. Holder*, 379 U.S. 104, 109-113 (1964); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-260 (1957).

The court of appeals held that "the certification in this case constitutes a clear abuse of discretion sufficient to invoke this extraordinary writ." [Petition, A6.] It found that the district court's certification was contrary to the Ninth Circuit's decision in *La Mar v. H. & B. Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973), and that the district court was following its own precedent, *Petition of Gabel*, 350 F.Supp. 624, 630 (C.D. Cal. 1972), rather than the rule of its own circuit. [Petition, A6-A7.] Such findings alone justified the issuance of the writ. *Will v. United States*, 389 U.S. 90, 96 (1967); *Schlagenhauf v. Holder, supra*, 379 U.S. at 110.

Moreover, the court of appeals held that the district court's interpretation and application of Rule 23 was "inconsistent with any tenable interpretation of Rule 23." [Petition, A6.] As the court of appeals correctly concluded, "Repeated errors of this magnitude in applying the Federal Rules of Civil Procedure may be corrected by mandamus." [Petition, A6-A7.] See *La Buy v. Howes Leather Co., supra*, 352 U.S. at 256.

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Petitioner's contention that an abuse of discretion in certifying a class cannot be corrected by writ of mandamus seeks to create a unique sanctity for Rule 23 certifications. There is, however, nothing so sacrosanct about class certification as to insulate this single judicial action from the normal application of the All Writs Act, 28 U.S.C. § 1651(a).

Conclusion.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM A. NORRIS,

Counsel for Respondent
McDonnell Douglas Corporation.

APPENDIX I.

Portions of the Reporter's Transcript of Proceedings on July 16, 1974.

BLEED THROUGH

THE COURT: Yes, Mr. Madole.

MR. MADOLE: Yes, Your Honor. I would like to get some clarification before this gets locked in.

First, I understood you to say to Mr. Kreindler that he was to be the, quote, representative of the class

POOR COPY

on liability.

THE COURT: That's right.

MR. MADOLE: Does that mean that he is the only representative of the class?

THE COURT: No.

MR. MADOLE: Will the Court in fact follow the suggested recommendations for selection of class counsel, a class having been ordered?

THE COURT: I indicated that the committee of counsel already appointed will be appointed by the Court in this order to act as a committee of counsel in the class action.

MR. MADOLE: There may be a very positive built-in conflict there, Your Honor, if in fact members of the plaintiffs' committee who do not agree that a class action is in the best interest of their clients, may be forced to join with an application to the Ninth Circuit, for either writ of prohibition, which I understand is the only thing that is available. I am wondering, Your Honor, if --

THE COURT: No. A writ of prohibition in the class action?

MR. MADOLE: Yes, sir.

THE COURT: Well --

MR. MADOLE: The point I am asking about now, first, Your Honor, is whether or not this representation

can be explained further.

I understood Mr. Kreindler to ask whether or not he was to be a representative as to damages. A response that I heard was that he was a representative as to damages of cases that were filed after the date of the order; is that correct?

THE COURT: He is the representative of the damages to cases that are filed after the date of the order unless they're filed by somebody else. Sometime, either before that or after, someplace in these rambling remarks which I have made without notes, incidentally, I indicated that the lawyers who had the cases now would keep those cases and be responsible for them; that if they have retainers now, and they file cases later, they will be their cases.

MR. MADOLE: If they're retained later, Your Honor

THE COURT: If they're retained later, yes.

MR. MADOLE: That's still --

THE COURT: That leaves you, Mr. Sterns, Mr. Butler, free to roam the 18 Arabian countries, England and Japan --

MR. MADOLE: Your Honor, our problem is not roaming those countries. Our problem is that we have been working very diligently --

THE COURT: Figuratively roam.

MR. MADOLE: -- attempting to get these

They were

this morning.

APPENDIX II.

Affidavit of Joseph R. Austin.

State of California, County of Los Angeles—ss.

JOSEPH R. AUSTIN, being first duly sworn, states:

1. I am an attorney at law duly admitted to practice before this Court. I am one of the attorneys representing McDonnell Douglas Corporation ("MDC") in the numerous litigations arising out of the March 3, 1974, crash of a Turkish Airlines DC-10 near Paris, France. I am personally familiar with the facts stated hereinafter.

2. Ticket coupons surrendered by persons boarding the flight in question indicated that there were 334 passengers and 12 crew members aboard the aircraft at the time of the accident.

3. Counsel for MDC maintains a continuously updated list of the litigations commenced by counsel which make claims based on the deaths of persons aboard the plane which crashed. These records disclose that there are presently pending in the United States District Court for the Central District of California 347 actions commenced by representatives of persons killed in the accident. These include 5 actions which have been settled. They also include 10 duplicative actions; that is, 10 decedents have had two actions commenced on their behalf. All of these actions have been assigned to United States District Judge Peirson M. Hall. They represent litigations commenced on behalf of all 12 crew members and on behalf of 325 of the 334 passengers.

4. Claims based upon the deaths of two passengers, Mrs. A. Middleton and Mr. James McDonald, were settled outside the United States.

5. This leaves potential claims based upon the deaths of seven passengers unaccounted for in the pending litigation or otherwise unresolved. Counsel for MDC have attempted without complete success to ascertain the nationalities of these seven decedents. It is our belief that the citizenship of the majority of these passengers was United Kingdom. We are satisfied that none of the unaccounted for passengers was a citizen or resident of the United States.

JOSEPH R. AUSTIN

Subscribed and sworn to before me this 29th day of January, 1976.

DORIS S. HARALSON,
Notary Public in and for said County and State